IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.602 OF 2003

IN

SUMMARY SUIT NO. 1351 OF 1998

Dena Bank & Anr. .. Plaintiffs

versus

Sonali Bank .. Defendant

...

Mr.M.M. Vashi for the plaintiff.

Mr.H. Toor with Mr.K.B. Irani i/b Harish Joshi & Co. for the defendant.

CORAM : D.G. KARNIK,J.

DATED : 4th May 2005.

P.C.:

1. Heard the learned counsel for the parties.

2. This Summons for Judgement is taken out by the plaintiffs in a suit filed by them for recovery of

the sum of US $ 1,50,103.79 together with interest on the principal sum of US $ 99,630 thereon at 20% p.a. from the date of the suit till payment. The facts as stated in the plaint are briefly summarised below:-

3. M/s.Saquib Garments and Hosiery Industries Limited (hereinafter referred to "Purchaser") placed order on the plaintiff no.2 for supply of cotton hosiery yarn. As the purchaser was an internationally buyer having its office/factory in Bangladesh the plaintiff no.2 requested it to open a letter of credit. Accordingly, the defendant Bank opened a letter of credit for the purchaser. In pursuance of the said letter of credit, the plaintiff no.2 shipped to the purchaser the cotton hosiery yarn under two different invoices dated 9th January 1995 and 13th January 1995. The plaintiff no.2 thereafter negotiated the letter of credit along with the bills of lading and necessary documents with the plaintiff no.1 Bank who credited the account of the plaintiff no.2 with the value of the bills. The defendant bank however failed and neglected to make the payment on the letter of credit on the due date under a false pretext. The plaintiff no.1 bank therefore revoked the credit given to the plaintiff no.2 who jointly

with the plaintiff no.1 has filed this suit for recovery of the amount due under the letter of credit.

4. It appears that on receipt of the goods, the purchaser found that the goods were not of the quality ordered. It therefore, instructed the defendant bank not to honour the letter of credit and asked for a discount of 60% of the value on account of the defects in the quality. It further appears that after negotiations, the plaintiff no.2 agreed to give discount of 20%. It is however contended that the discount of 20% was not on account of any defects in the goods but only as a gesture of goodwill. As the purchaser was not satisfied with the amount of the discount it instructed the defendantt bank not to pay. It is alleged by the plaintiff that the defendant bank in collusion with the purchaser has declined to make the payment under the letter of credit under a false pretext.

5. The learned counsel for the plaintiff submit that the banks deal in the documents and are not concerned with the underline contract between the purchaser and the buyer. If the letter of credit is

presented by a negotiating bank in accordance with the terms of the letter of credit along with the documents required to be submitted as specified in the letter of credit, the issuing bank must make the payment. Neither the negotiating bank nor issuing bank are concerned with any disputes with regard to the quality of the goods and the issuing bank must make the payment in accordance with the terms of the letter of credit. In support of these submissions the learned counsel for the plaintiff relies upon the decisions of the Supreme Court in Fargo Freight Ltd. Vs Commodities Exchange Corporation and others reported in 2004(7) SCC 203, and in Federal bank Ltd. Vs. V.M. Jog Engineering Ltd. & ors. reported in 2001(1) SCC 63. There can be no dispute in the proposition of the banks deal in the documents and if the letter of credit is presented to the issuing bank in accordance with the terms of the letter of credit along with the concerned documents which are required to be submitted in accordance with the terms of the letter of credit, the issuing bank must make the payment. The banks are not concerned with the dispute between the buyer and seller of the goods regarding the quality of the goods.

6. Learned counsel for the defendant, however submits that the terms and conditions of the letter of credit were not obeyed. The letter of credit was not presented within the period of its validity. The letter of credit was not unconditional but it stipulated a condition that the vendor or its banker must present the letter of credit along with certain documents including a certificate of quality to be issued by a specified inspecting agency. The plaintiff no.1 nank had not presented the letter of credit along with the necessary certificate of the inspecting agency and was therefore not entitled to claim the payment. Learned counsel for the defendant further submits that in any event there is no term in the letter of credit that interest would be payable on account of delayed payment. The plaintiff is therefore not entitled to interest. As the plaintiff has claimed past interest of US $ 50,006.07 and as the since the interest is neither payable under the contract nor under any statutory provision the defendant is entitled to an unconditional leave to defend the suit.

7. As regards the first contention of the defendant is that the letter of credit along with the

necessary documents has not been presented to the defendant bank within the period of validity of the letter of credit it would be necessary to refer to the last clause of the letter of credit (see page 21 of the plaint) which reads thus:-

> "Truck receipt/must be dated not later than 15th December, 1994. Bills of exchange must be dated and negotiated not later than 15 days from the date of T/R. Drafts should be enfaced. Drawn under Sonali Bank Documentary Credit No.10/DK/32/94/3845/DP. We hereby engage with the drawers, endorsers and bonafide holders of drafts drawn under and compliance with the terms of this credit that such drafts will be duly honoured on delivery of documents as specified if presented before expiry Date 29th December, 1994."
> (underlining supplied)

It was a condition of the letter of credit that the truck receipts/bill of lading must be presented not later than 15th December 1994 and the letter was to be negotiated not later than 15 days from the date of the lorry receipt/shipment receipt. Thereafter, the letter of credit along with lorry receipt and other necessary document was required to be presented to the issuing bank on or before 29th December 1994. In paragraph no.8(A) of the plaint,

the plaintiff has stated that the letters of credit were despatched by it (for payment) to the issuing bank on 9th January 1995 and 13th January 1995 and they were received by the defendant bank on 13th January 1995 and 17th January 1995 respectively. Perusal of the forwarding letters dated 9th January 1995 and 13th January 1995 (Exhibit E1 and E2 of the plaint) show that the goods were despatched on 24th December 1994. It is thus clear that the goods were despatched after the period allowed by the letter of credit. It is also clear that the letter of credit was not presented to the purchaser bank within the period of validity to expire on 29th December 1994. Learned counsel for the plaintiff submits that by issuance of a first amendment (copy of which is at Exhibit-B), the defendant bank has extended the period of despatch of the goods upto 21st December 1994 and presentment of the letter of credit upto 13th January, 1995. In paragraph no.11 of the affidavit in reply, the defendant bank has denied that it extended the period of validity for the despatch of the goods and presentation of the letter of credit to 29th December 1994 and 13th January 1995 respectively. In view of the categorical denial by the defendant about the extension of the

period of the letter of credit, the plaintiffs would be required to prove at trial, by adducing evidence, that the period of validity was extended by defendant as alleged. Even assuming that the period for presenting of letter of credit was extended upto 13th January 1995, in paragraph no.8A of the plaint, the plaintiffs have clearly admitted that atleast one of the bill was presented on 17th January 1995. i.e. even beyond the extended period of the letter of credit. Thus, in my view the first defence of the defendant requires consideration at the trial.

8. The learned counsel for the defendant then invited my attention to condition no.4 annexed to the letter of credit (page 22 of the plaint). Clause no.4 reads as under:-

> "Preshipment Inspection of the merchandise must be conducted by Any Internationally Recognised Inspecting Agent preferably SGS/Superintendence co. of Bangladesh Ltd/Lloyds or by Managing Director of M/s.Saquib Garments & Hosiery Industries Ltd. Plot No.5 Chashara C/A, Narayanganj is also acceptable etc. at Beneficiary's cost and a Certificate to be issued by the concerned Inspecting Agent to the effect that the merchandise have been shipped strictly as per specification/ quality/quantity and other terms as stipulated in the relative Indent and

> also as per L/C terms must accompany the original shipping documents for negotiations.

9. The letter of credit was not unconditional but the vendor the goods and the negotiating bank were required to fulfil certain conditions including condition no.4 which specifies that Preshipment Inspection of the Merchandise should be conducted through any Internationally recognised inspecting agency, and a certificate issued by the inspecting agency to the effect that merchandise have been shipped strictly as per the specification/ quality/quantity should accompany the original shipping documents for negotiations. Learned counsel invites my attention to the two letters written by the plaintiff Bank (Exhibit E1 and E2) on 9th January 1995 and 13th January 1995 presenting the letter of credit with documents. The first letter mentioned the documents presented alongwith the letter of credit, and they are: i) draft invoice ii) bill of lading iii)Insurance Policy iv) Certificate of drugs v) packing list. It is pertinent to note that a certificate of inspection by an Internationally Recognised Inspecting Agency was not attached as was the requirement of the

letter of credit. Thus, the plaintiff no.1 Bank while presenting the letter of credit had not strictly fulfilled the terms and conditions of the letter of credit. Therefore, the defence by the defendant bank that plaintiff bank is not entitled to claim payment as the terms and conditions of the letter of credit have not been fulfilled cannot be said to be a sham or fictitious defence requiring no consideration. It is true that in the earlier correspondence, the defendant bank has not raised the contention that the terms and conditions of the letter of credit were not strictly fulfilled. However, when such a defence is raised in reply to the Summons for Judgement and the defence, prima facie, appears to be probable and bonafide, it would be necessary to consider the defence. The effect of non raising of the defence earlier can only be considered at the stage of the trial of the suit.

10. The letter of credit does not specify that any interest would be paid by issuing bank. Even the terms and conditions of the invoice do not show any liability to pay any interest on account of the delayed payment. In any event no rate of interest was agreed upon. In paragraph no.19 of the plaint,

the plaintiff has stated that letter of credit is a negotiable instrument under the Negotiable Instruments Act and therefore, the plaintiffs are entitled to interest at 20% p.a. Section 13 of the Negotiable Instruments Act defines the Negotiable Instrument as a promissory note, bill of exchange or a cheque payable either to the order or bearer. Letter of credit is per-se not a Negotiable Instrument within the meaning of section 13 of the Negotiable Instrument Act. Letter of credit may be transferable by means of a delivery and endorsement by the custom between the bankers but that would not make it a Negotiable Instrument under the Negotiable Instruments Act 1881. Therefore, claim of interest made by the plaintiff on the basis of a statute viz. Negotiable Instruments Act 1881 cannot prima facie be accepted. Furthermore, assuming that Letter of credit is a negotiable instrument, u/s.80 of the Negotiable Instruments, interest can be charged only at 18% p.a. whereas the plaintiff has claimed interest at 20% p.a. Prima facie, the claim for interest is neither based on a contract nor based on a statute and on that count also, the defendant would be entitled to an unconditional leave.

11. For these reasons, defendant is granted unconditional leave to defend the suit.

12. I am informed at the bar that the defendant has deposited a sum of Rs.35 lakhs in this Court in pursuance of an order passed by this Court while setting aside an ex-parte decree and amount has been allowed to be withdrawn by the plaintiff subject to furnishing of a bank guarantee. As the defendant is granted unconditional leave to defend the suit, the plaintiff is directed to re-deposit the money withdrawn by it in this Court within a period of six weeks failing which the Prothonotary shall invoke the bank guarantee issued by the plaintiff at the time of the withdrawal of the money and call the money in the Court. After receipt of the money in the Court, the defendant bank is permitted to withdraw the said sum by filing an undertaking to this Court to re-deposit the money if so ordered by the Court or if a decree is passed in the suit.

D.G. KARNIK, J